No. 18875

United States
COURT OF APPEALS
for the Ninth Circuit

INTERNATIONAL BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA (AFL-CIO) and CARPENTERS' LOCAL 1849, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Appellants-Appellees,

vs.

C. J. MONTAG & SONS, INC., a corporation, CARL M. HALVORSON, INC., a corporation, AUSTIN CONSTRUCTION CO., a corporation, BABLER BROS., INC., a corporation, and McLAUGHLIN, INC., a corporation,

Appellees-Appellants.

APPELLEES-APPELLANTS' REPLY BRIEF

Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

HONORABLE WILLIAM J. LINDBERG, Judge.

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SUBJECT INDEX

TABLE OF CASES

STATUTES

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STATEMENT OF THE CASE

Pursuant to a stipulation between the parties concerning the method of filing briefs, this brief constitutes

appellees' reply brief on the issues raised by their appeal. These issues were discussed in appellees' opening brief (pp. 7-29) and in appellants' answering brief (pp. 2-15).

Appellants have taken exception to that portion of appellees' statement of facts which states that the appellees made the assignment of rigging both wooden and metal forms on multipurpose cranes to the Ironworkers after an investigation disclosed that this was the *"established practice in the locality."* Appellees did not intend by the use of this language to convey the impression that there was a finding that appellees had assigned the disputed work in accordance with the "established practice in the local area" as provided in the Procedural Rules and Regulations of the National Joint Board (Exhibit 3, p. 4, Par. 3(b)). The fact is that the court made no finding with respect to appellees' compliance or noncompliance with the Procedural Rules. However, as appellants admit, the assignment was made in compliance with the established practice on dam projects in the Pacific Northwest and in accordance with appellees' construction of the Procedural Rules, particularly Pars. 3(b) and (c) of the Contractor's Responsibility provisions (Exhibit 5, p. 44; CT 29, Par. 8).

Certainly appellees' actions with respect to the initial assignment; their subsequent efforts to work out an equitable solution with the two competing unions; their early requests for assistance from the Joint Board (Exhibits 21, 24, 28, 32 and 34); and their subsequent efforts to comply with the Joint Board award, all as discussed in appellees' opening brief, pp. 11-18, disprove

appellants' statement that "appellees intended to avoid, and steadfastly refused to be bound by, the collective bargaining agreement or the procedure of the Joint Board" (Appellants' Answering Brief, p. 3). Furthermore, appellants' statement on page 21 of their reply brief that appellees did not notify the Joint Board of the jurisdictional dispute until September 5, 1957, is clearly erroneous (Exhibits 21, 24, 28, 32 and 34). Appellees submit that this statement is nothing more than an ineffectual attempt to justify appellants' own refusal to comply with the Union's Responsibility provisions of the Procedural Rules (Exhibit 3, pp. 5 and 6, Pars. 1, 2, 3 and 4).

SUMMARY OF ARGUMENT

1. The trial court erred in reducing appellees' damages by the sum of $40,000 "in mitigation of damages."

2. The trial court erred in reducing the damages awarded appellees for the loss of use of idled equipment by 50 per cent of the reasonable rental value of such equipment.

3. Appellees are entitled to recover a reasonable profit markup of ten per cent on damage items 1 through 7.

4. Appellees are entitled to recover, as damages, interest on the amount of damages awarded from January 1, 1959, to the date of judgment.

ARGUMENT

I

THE TRIAL COURT ERRED IN REDUCING APPELLEES' DAMAGES BY THE SUM OF $40,000 "IN MITIGATION OF DAMAGES"

In their opening brief, pp. 9-21, appellees set forth the reasons for their argument that the trial court's action in reducing appellees' damages by $40,000 "in mitigation of damages" was erroneous. Appellants' answering brief indicates that the parties are in dispute over two basic issues with respect to this aspect of appellees' appeal: (1) Does the court's conclusion conflict with the jurisdictional limitations of Section 301, Labor Management Relations Act, 1947 (29 U.S.C. Sec. 185); and (2) Do the facts of this case, including the conduct of appellees, justify an application of the equitable doctrine of mitigation of damages.

In their opening brief (pp. 9-10) and answering brief (pp. 46-50), appellees relied in part on *Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.,* 348 U.S. 437, 75 S. Ct. 489 (1955), in support of their argument that the court's conclusion was erroneous and in answer to appellants' argument that they were entitled to a judgment on their cross complaint.

Appellants have cited no case authority in their answering brief which refutes appellees' interpretation of the court's ruling in *Westinghouse* or of the subsequent decisions in *Textile Workers of America* v. *Lincoln Mills,* 353 U.S. 448, 77 S. Ct. 912 (1957), and *Smith* v. *Evening*

News Association, 371 U.S. 195, 83 S. Ct. 267 (1962). Since the filing of appellees' initial brief, this court has decided *Retail Clerks Local* 1222 v. *Alfred M. Lewis, Inc.,* 327 F.2d 442 (9th Cir. 1964), which appellees believe is consistent with their position here.

Retail Clerks was an action brought under Section 301, Labor Management Relations Act, 1947, by a union and its secretary. Plaintiffs sought a judgment requiring the defendants to comply with the provisions of a collective bargaining agreement allegedly requiring a retroactive cost of living adjustment in favor of employees covered by the agreement or, in the alternative, for a declaratory judgment construing the agreement. The individual plaintiff alleged that he represented all of the members of the bargaining unit who were too numerous to be named and brought before the court individually. Relying on *Westinghouse,* the lower court granted defendants' motion to dismiss the action on the ground that it had no jurisdiction under Section 301. This court reversed and remanded the case to the District Court.

The court's holding in *Retail Clerks* does not vary from appellees' interpretation of the decisions in *Westinghouse* and *Smith* and seems to be a logical application of the *Lincoln Mills* doctrine. Contrary to *Westinghouse* and the instant case, the plaintiffs in *Retail Clerks* were not seeking to recover a judgment for money owing to individual members of the union. They sought only a judgment requiring the defendants to comply with the collective bargaining agreement. The union's pur-

pose was to enforce compliance with an agreement to which it was a party. It was not seeking to enforce the uniquely personal rights of its individual members to collect additional wages due them. If the plaintiffs had been seeking a money judgment for wages due individual members, we submit that it would have been necessary that such individuals' rights be brought before the court for determination either by virtue of an assignment to the plaintiffs, as in *Smith,* or in some other manner which would have enabled the court to act.

In the instant case, appellants filed a cross complaint seeking to recover damages which the unions allegedly sustained by reason of appellees' asserted breach of the collective bargaining agreement and then sought to have those damages measured by the wages which they claim would have been paid to the individual members of Local 1849. The trial court concluded that it had jurisdiction over appellants' cross complaint but that appellants had not shown and could not recover other than nominal damages on their cross complaint (CT 82). However, by reducing the sum awarded appellees, the court, by indirection, permitted appellants to recover everything they sought, using, as a measuring device, the wages which allegedly would have been paid to the individual members of Local 1849. This the court did without *any* evidence that individual employees of Local 1849 sustained any damages or would have earned any additional wages during the period covered by the claim; without any attempt to identify the persons affected or to have them brought before the court for a binding determination of their rights; and without affording

appellees any protection against the possible subsequent enforcement of those rights by the individuals under Section 301.

We agree that the trial court had jurisdiction to consider appellants' claim of damages for breach of the collective bargaining agreement. We cannot agree, however, that the court had jurisdiction to allow the recovery by appellants of the uniquely personal wage claims belonging to individual employees.

Appellees submit that appellants were precluded from bringing an action under Section 301 to recover the damages which the trial court allowed by way of mitigation without an assignment of the individuals' claims or without otherwise bringing those individuals before the court for a determination of their respective rights. Since appellants were precluded from maintaining such an action directly, the lower court erred in affording them the very same relief "in mitigation of damages" and thereby violating the jurisdictional limitations of Section 301.

Appellants have also argued that the facts of this case justify an application of the equitable doctrine of mitigation of damages because of the "uncompromising attitude" of appellees. The facts of this case do not justify that terminology. As discussed in detail in their opening brief (pp. 11-18), appellees made every effort to accommodate the competing demands of the two unions and to place the Joint Board award in effect insofar as that could be done consistently with the award's provisions against featherbedding and duplicate

crews. However, as discussed in appellees' opening brief, the award and the agreement after which it was patterned were impractical and impossible of performance (Exhibit 9, p. 29, RT 888, 890-891).

In any event, the existence of an "uncompromising attitude" on the part of a plaintiff such as this court found did not exist in *International Longshoremen's, Etc.* v. *Juneau Spruce Corp.*, 189 F.2d 177, 191 (9th Cir. 1951), does not warrant a reduction of actual damages shown. Application of the doctrine of mitigation of damages depends upon the good faith conduct of a defendant, not the bad faith conduct of a plaintiff. Conduct of a plaintiff may be considered for the purpose of applying the doctrine of avoidable consequences but that doctrine has no application here for the reasons discussed in appellees' opening brief (pp. 18-19).

For the reasons set forth above and in their opening brief (pp. 9-21), appellees submit that that portion of the lower court's judgment which reduced the amount of damages awarded appellees by $40,000, "in mitigation of damages," should be reversed.

II

THE TRIAL COURT ERRED IN REDUCING THE DAMAGES AWARDED APPELLEES FOR THE LOSS OF USE OF IDLED EQUIPMENT BY 50 PER CENT OF THE REASONABLE RENTAL VALUE OF SUCH EQUIPMENT

Appellees' argument in support of the above Specification of Errors is found on pages 22-25 of their open-

ing brief. Appellants have presented no argument on this issue in their answering brief. As discussed in appellees' opening brief, the cases do not support the lower court's conclusion that appellees' damages for idled equipment should be reduced by 50 per cent of the reasonable rental value. Furthermore, there is no evidence in the record which would support a finding that the reduction should have exceeded 25 per cent in this case.

Accordingly, for the reasons stated in their opening brief, appellees submit that to the extent the court below reduced appellees' damages for idled equipment by an amount in excess of 25 per cent of the reasonable rental value of said equipment, its finding was contrary to the evidence and clearly erroneous.

III

APPELLEES ARE ENTITLED TO RECOVER A REASONABLE PROFIT MARKUP OF TEN PER CENT ON DAMAGE ITEMS 1 THROUGH 7

Appellees seek to recover a reasonable profit markup of ten per cent on damage items 1 through 7 (CT 70) which represent the additional out-of-pocket expenses that they were required to incur during the work stoppage periods. This claim is based on the fact that if appellants had not interfered with appellees' freedom to employ their labor and capital during the work stoppages, appellees could have recovered not only these out-of-pocket expenses but also a reasonable profit markup. Appellees' evidence shows that a ten per cent

profit markup is reasonable in the construction industry on jobs of this type and that this was the markup used by appellees in bidding on the Ice Harbor contract (RT 509).

This is not a case in which appellees are seeking to recover damages measured by loss of profits such as is true of the cases cited by appellants in their answering brief. On the contrary, this is a case where an award of pure out-of-pocket expenses is insufficient to compensate appellees for their losses without the addition of the *same ten per cent markup* on those items which appellees included in bidding this job. Appellees fail to see any distinction in this regard between this case and *Morrison - Knudsen Company, Inc.* v. *International Brotherhood of Teamsters, Etc.,* D.C.E.D. Wash. S.D., Civil No. 1105, aff'd *International Brotherhood* v. *Morrison-Knudsen Co.,* 270 F.2d 530 (9th Cir. 1959), discussed at p. 26 of appellees' opening brief, nor have appellants pointed to any distinction.

IV

APPELLEES ARE ENTITLED TO RECOVER, AS DAMAGES, INTEREST ON THE AMOUNT OF DAMAGES AWARDED FROM JANUARY 1, 1959, TO THE DATE OF JUDGMENT

Appellees' argument in support of their claim for recovery of interest as damages is found on pages 26-29 of their opening brief. Appellants have presented no argument in answer to appellees' contention that they were entitled to interest, in the discretion of the court,

on those item of damages, if any, which could not have been ascertained on January 1, 1959. For the reasons presented in their opening brief, appellees submit that the court below erred in holding that it had no such discretion (RT 1147).

Appellees also argued that they were entitled to recover interest as a matter of right on those items of damages which could have been ascertained on January 1, 1959, on the basis of the evidence submitted at the trial. Certainly this would include at least the amounts which appellees were required to expend for overhead salaries, property maintenance wages, miscellaneous costs, wage increases and sandblasting. Those amounts could have been ascertained from appellants' books and records prior to January 1, 1959.

Appellants argue that *Grays Harbor County* v. *Bay City Lumber Company,* 47 Wn. 2d 879, 289 P.2d 975 (1955), one of the cases cited by appellees in support of their argument, is not in point for the reason that it was a conversion action. Although we agree that *Grays Harbor* was a conversion action, we fail to see why the rule applied in that case is not also applicable where the loss results from an unlawful detention or deprivation of the use of property as in the instant case. Here appellees were deprived of the use of their property just as effectively as they would have been if appellants had converted it.

None of the cases cited by appellants supports the conclusion that the rule in *Grays Harbor* is not applicable here. Certainly *Meyer* v. *Strom,* 37 Wn. 2d 818, 226

P.2d 218 (1951), and *Woodbridge* v. *Johnson,* 187 Wash. 191, 59 P.2d 1135 (1936), both of which are contract cases, have no application here. And, although in *Lamb* v. *Railway Express Agency,* 51 Wn. 2d 616, 320 P.2d 644 (1958), proof of negligence was required, the cause of action appears to have been for breach of a bailment contract. In any event that case would fall within the exception to the *Grays Harbor* rule which applies where property is unintentionally lost or destroyed while *rightfully* in the defendant's possession.

For the reasons discussed above and in their opening brief, appellees submit that the court erred in not allowing appellees interest, on the amount of damages awarded, from January 1, 1959, to the date of judgment.

CONCLUSION

Appellees respectfully submit that the District Court's judgment reducing appellees' damages by $40,000 in mitigation of damages should be set aside and that appellees' judgment should be increased by that amount together with a reasonable profit markup, interest and additional damages for the loss of use of equipment idled by the work stoppages.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES J. MCMURCHIE

Of Attorneys for
Appellees-Appellants